

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DEMOCRACY FORWARD FOUNDATION
1333 H St. NW
Washington, DC 20005,

Plaintiff,

v.

Case No. 19-cv-882

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES
200 Independence Ave. SW
Washington, DC 20201,

Defendant.

COMPLAINT

1. Plaintiff Democracy Forward Foundation brings this action against Defendant the United States Department of Health and Human Services (“HHS”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (the “FOIA”). Defendant has failed to sufficiently respond to Plaintiff’s FOIA request for records that relate to the agency’s rulemaking concerning *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 83 Fed. Reg. 3,880 (Jan. 26, 2018) (Notice of Proposed Rulemaking). Plaintiff therefore respectfully requests that the Court compel Defendant to comply with the FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

PARTIES

4. Plaintiff Democracy Forward Foundation is a not-for-profit organization incorporated under the laws of the District of Columbia, and based in Washington, D.C. Plaintiff works to promote transparency and accountability in government, in part by educating the public on government actions and policies.

5. Defendant HHS is a federal agency within the meaning of the FOIA, *see* 5 U.S.C. § 552(f)(1), that is headquartered in Washington, D.C. HHS has possession, custody, and control of records to which Plaintiff seeks access.

FACTUAL ALLEGATIONS

6. On December 20, 2018, Plaintiff sent a FOIA request to HHS concerning HHS's rulemaking on *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 83 Fed. Reg. 3,880 (Jan. 26, 2018). Plaintiff requested the following categories of records from HHS:

1. All documentation substantiating HHS's statement that "Since the designation of OCR as the agency with authority to enforce Federal health care conscience laws in 2008, [HHS's Office for Civil Rights ('OCR')] has received a total of forty-four complaints, the large majority of which (thirty-four) were filed since the November 2016 election." 83 Fed. Reg. at 3,886.

2. Any correspondence or communications between HHS OCR and any of the complainants who filed the "thirty-four" complaints "since the November 2016 election," *id.*, that pre-dated the complainants' filing of the respective complaints.

3. All records reviewed or considered by HHS in drafting *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 83 Fed. Reg. 3,880 (Jan. 26, 2018) (Notice of Proposed Rulemaking).

Ex. A at 1. Plaintiff specified that "the date range for this search is from January 20, 2017 to the date the search is conducted." *Id.*

7. Plaintiff sought a waiver of search and duplicating fees under 5 U.S.C. § 552(a)(4)(A)(iii), which requires a fee waiver if the disclosure is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *See* Ex. A at 2-3.

8. By letter dated January 22, 2019, HHS acknowledged having received Plaintiff’s FOIA request on December 20, 2018, and having assigned it request number 2019-00415-FOIA-OS. By follow-up email on January 23, 2019, HHS confirmed that it had sufficient information to assess Plaintiff’s request for a fee waiver but would not be addressing Plaintiff’s request at that time.

CLAIM FOR RELIEF

Count One (Violation of the FOIA, 5 U.S.C. § 552)

9. Plaintiff repeats and incorporates by reference the foregoing paragraphs as if fully set forth herein.

10. As of the date of this Complaint, Defendant has failed to produce all records requested by Plaintiff in its December 20, 2018 FOIA request or to demonstrate that such records are lawfully exempt from production. *See* 5 U.S.C. § 552(a)(6)(C). Nor has Defendant notified Plaintiff of the scope of any responsive records it intends to produce or withhold and the reasons for any withholdings, or informed Plaintiff that it may appeal any adequately specific, adverse determination.

11. By failing to respond to Plaintiff’s request within the statutorily prescribed time limit, Defendant has violated its duties under the FOIA, including but not limited to its duties to conduct a reasonable search for responsive records, and to produce all responsive, reasonably segregable, non-exempt information.

12. Plaintiff is being irreparably harmed by Defendant's violation of the FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with the FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

1. order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request;
2. order Defendant to produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records withheld under a claim of exemption;
3. enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request;
4. order Defendant to grant Plaintiff's request for a fee waiver;
5. grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
6. grant any other relief this Court deems appropriate.

Dated: March 28, 2019

Respectfully submitted,

/s/ Adam Grogg

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